No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GARY L. WEINER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the receipt that a charity provides to a donor for substantiating a tax-deductible charitable contribution must state speculative future benefits that might result to the donor if the donor makes voluntary charitable contributions in future years, even though the applicable statute and regulations provide that the charity's receipt shall only report any benefit from the contribution made in the current tax year.

PARTIES TO THE PROCEEDING

The caption of the case as it appears on the cover contains the names of all the parties.

CORPORATE DISCLOSURE STATEMENT

Not applicable. Petitioner is not a corporate entity.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gary L. Weiner ("Gary Weiner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The unpublished memorandum opinion of the Ninth Circuit was entered on July 8, 2004, and is reproduced in the appendix hereto at Appendix A, p. 1a. In its memorandum opinion, the Ninth Circuit cited to its opinion in the case of *Addis v. Commissioner of Internal* Revenue, Case No. 02-73628, which opinion is reported at 374 F.3d 881, and is reproduced in the appendix hereto at Appendix B, p. 2a. The order denying Petitioner's Petition for Rehearing and Rehearing en Banc, Appendix E, p. 22a, was entered on September 21, 2004, and is not reported. The opinion of the

United States Tax Court, entered on June 18, 2002, is reproduced in the appendix hereto at Appendix C, p. 14a.

JURISDICTION

The Ninth Circuit entered its judgment in this case on July 8, 2004, Appendix A, p. 1a, and denied the Petition for Rehearing en Banc on September 21, 2004, Appendix E, p. 22a. The jurisdiction of the United States Tax Court was based on 26 U.S.C. §§ 6213 and 7442. The jurisdiction of the Ninth Circuit was based on 26 U.S.C. §§ 7482 and 7483. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This proceeding does not call into question the constitutionality of any Act of Congress or any statute of any State, therefore, the notification requirements of Rule 29.4(b) and (c) do not apply.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statute at issue in this case is 26 U.S.C. § 170(f)(8) and is reproduced at Appendix F, p. 23a. The regulations at issue in this case are 26 C.F.R. §§ 1.170A-1(h)(4) and 1.170A-13(f)(6) and are reproduced at Appendix F, pp. 24a - 26a.

STATEMENT OF THE CASE

The Ninth Circuit's decision in this case will impose a new and extremely difficult burden on charities (which is contrary to the statute and regulations) when a charity provides a receipt to a donor that may make future contributions, and will eliminate charitable tax deductions that such a donor clearly is entitled to claim under the tax laws.

A donor must obtain a receipt from a charity to claim a charitable tax deduction for a contribution in excess of $250. The statute provides that on the receipt the charity must describe, and provide a good faith estimate of the value of, any goods or services which the charity provides in con-

sideration for the "property" contributed. Internal Revenue Code (the "Code") § 170(f)(8). Similarly, the regulations require the charity to describe and value the consideration "*for that payment*." 26 CFR § 1.170A-13(f)(6) (emphasis added). (App. F at p. 25a).

In 1997 and 1998, Gary Weiner paid $93,000 to a charity that was eligible to receive tax deductible contributions. In 1997 and 1998, the charity received the charitable donation of $93,000, and paid premiums on life insurance policies (insuring Gary Weiner's daughter and son-in-law). In addition, each year Gary Weiner paid $7,278 in non-deductible premiums to the insurance companies for an interest in the same life insurance policies. Gary Weiner and the charity were parties to agreements under which the charity had certain rights in the life insurance policies and Gary Weiner had certain rights in the policies. The charity provided Gary Weiner with timely receipts for his 1997 and 1998 contributions stating that the charity provided no goods or services to Gary Weiner in consideration of his contributions. At trial, the undisputed testimony was that the charity did not overpay for its rights under the life insurance policies. As a direct consequence, Gary Weiner could not have received any goods or services from the charity. The Internal Revenue Service ("IRS") stipulated that it did not engage any outside consultants or engage any internal valuation engineers to perform an economic analysis regarding the benefits (enjoyed by the charity and the Taxpayer) under the arrangement.

The IRS issued a notice of deficiency disallowing Gary Weiner's charitable income tax deductions for his contributions to the charity. Gary Weiner filed a petition with the U.S. Tax Court under 26 U.S.C. § 6213 to challenge the IRS's proposed deficiency. The Tax Court had jurisdiction under 26 U.S.C. § 7442.

The Tax Court concluded that Gary Weiner was entitled to absolutely no charitable income tax deduction for his contributions to the charity on the grounds that the charity's receipt failed to satisfy the statutory requirement that the receipt must describe, and provide a good faith estimate of, any goods or services provided in consideration for the contribution. The Tax Court concluded that Gary Weiner received consideration in return for his charitable contributions because his trusts would be entitled to 41% of the death benefit under the life insurance policies. That factual finding was clearly erroneous because under established insurance rates, Gary Weiner paid for his share of the death benefit with non-deductible premium payments.

Gary Weiner appealed the Tax Court's decision to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the result reached by the Tax Court, but rejected the Tax Court's analysis. The Ninth Circuit Opinion states that it will "clarify what constitutes the undisclosed benefit." (App. B at p. 10a). [The Ninth Circuit merely issued a Memorandum Opinion in this case which states "for the reasons stated in *Addis v. Commissioner*, No. 02-73628 (9th Cir. July 8, 2004), the tax court's judgment is AFFIRMED." (App. A, p. 1a). As a result, in this Petition, references to the "Ninth Circuit's Opinion" will be to the Ninth Circuit's Opinion in the Addis case.]

The Ninth Circuit's rationale in finding a benefit back to the donor is entirely different from the Tax Court's approach. The Ninth Circuit reaches its conclusion only by speculating on what might have happened if Gary Weiner had made payments to the charity every year for ten years. The Ninth Circuit Opinion states, "The regulatory definition of consideration . . . calls for us to view all the benefits the [donor] expected *from the split-dollar deal*" (emphasis added). (App. B at p. 11a). This is contrary to the statutory and regulatory limitation that the charity need only disclose and value goods

and services the donor expects to receive "in exchange *for that payment*." (emphasis added). (App. F at p. 25a). Although the Ninth Circuit assumes that the donor will make payments for several years under "the split-dollar deal" (presumably ten annual contributions), Gary Weiner was under no obligation to make future contributions (so there was no binding "deal"), and in fact Gary Weiner stopped making contributions.

REASONS FOR GRANTING THE PETITION

I. THIS CASE RAISES AN IMPORTANT QUESTION THAT SHOULD BE DECIDED BY THIS COURT.

A. The Ninth Circuit's Opinion Will Impact Charities and Donors When the Donor May Contribute in Future Years.

This is the first time that a court has interpreted 26 CFR § 1.170A-13(f)(6). This case may impact every charity and every donor. Whenever a charity will issue a receipt for a charitable donation from a donor who may contribute in future years, this issue may arise. The Ninth Circuit's approach will place a burden on charities contrary to the statute and regulations, and it will inappropriately prevent donors from claiming charitable contribution deductions when such deductions are otherwise permitted under the tax law. For those reasons, the U.S. Supreme Court should decide this important issue.

The Ninth Circuit Opinion replaces the phrase "for that payment" in the regulation with the phrase "from . . . the deal." In preparing a receipt, the charity will now be obligated to disclose any benefit which the donor might expect *assuming* that the donor will make future contributions. Many charities anticipate (and solicit) on-going donations (such as multi-year pledges). The Ninth Circuit

ignores the fact that if the donor makes future contributions in future years that result in a benefit to the donor, the charity can disclose that benefit in the receipts in those future years. The Ninth Circuit Opinion will require charities to disclose and value, in the year of the first donation, all the benefits which the donor may expect "from that payment" *and* from all future contributions "from . . . the deal." Requiring charities to speculate in this manner is contrary to the "for that payment" limitation. Also, the approach adopted by the Ninth Circuit will inappropriately disallow charitable contribution deductions that are otherwise allowed under the tax law. An example demonstrates the problems that will arise.

Example. A University establishes the "mémento fund-raising campaign." If a donor contributes $500 in Year 1, she receives nothing in return in Year 1, but becomes a member of the "memento" club. If she makes a $500 contribution in Year #2 she will receive a pen with a value of $100. If she continues to contribute $500 each year thereafter, she will receive: in Year #3 a set of book-ends worth $200; in Year #4 a rocking-chair worth $300, and in Year #5, a desk worth $400. In the absence of the Ninth Circuit Opinion in this case, in Year #1, under Code § 170(f)(8) and 26 CFR § 1.170A-13(f)(6), the charity's receipt only needs to state whether the donor received or expects to receive consideration "for that payment"—in this example, the donor receives (and expects to receive) no benefit from the $500 payment in Year #1 because a "future payment" will be required to obtain a benefit. Each year thereafter, under Code § 170(f)(8) and 26 CFR § 1.170A-13(f)(6), the Charity can provide a receipt which states that the Charity received a gift of $500 and provided goods worth the value of the memento transferred in that year. Mementos to be transferred in future years would not need to be disclosed on the receipt because those would only be given in consideration for a future contribution. After five years, the five receipts from the charity, in total, would report contributions of $2,500 and

consideration received or expected of $1,000. The donor in this example would be entitled to total charitable contribution deductions of $1,500 [$2,500-$1,000 = $1,500].

In contrast, under the analysis in the Ninth Circuit Opinion, in Year #1, the Charity would need to estimate the value of *all* the goods and services which the donor receives or expects to receive "from the . . . deal." The Charity's receipt in Year #1 would have to state that the donor made a $500 donation but received or expects to receive goods with a value of $1,000 (the sum of the goods expected to be provided in Years #2 though #5). Every year thereafter, the Charity would need to state in the receipt that the sum of the goods expected to be received in the future exceeds the current year's contribution, so that the donor would be entitled to zero tax deduction, except in Year #5 when the Charity's receipt could state that the donor expects to receive a memento worth $400 in consideration for a $500 contribution. Thus, over five years, the donor would contribute $2,500, and would only be entitled to deduct $100. The Ninth Circuit Opinion will lead to absurd results.

Similar situations will arise whenever any donor makes a multi-year pledge to a charity with the expectation of receiving future benefits from the charity in future years for future donations. Thus, the Ninth Circuit Opinion will create serious problems for charities and their donors in many situations.

B. The Ninth Circuit's Opinion Will Impact Charities and Donors When a Mere Valuation Error Is Involved.

The draconian rule of Code § 170(f)(8)—that the donor is entitled to zero charitable deduction if the charity's receipt fails to provide a good faith estimate of the value of the goods provided in consideration for the donation—should only apply if the donor knew or had reason to know that the receipt

was "unreasonable." 26 CFR § 1.170A-1(h)(4). (App. F at 25a). The Tax Court thought they found a benefit "for that payment" in the death benefit, but the Ninth Circuit appropriately rejects that finding. The Ninth Circuit Opinion fails to state a benefit "for that payment" (in 1997 or 1998), and instead only identifies a potential benefit that might arise from future payments—not from the payments made in 1997 or 1998. The statute and regulations require that the charity's receipt state the consideration "for that payment," and here neither court has found any consideration "for that payment" because there was no consideration "for that payment." The fact that the Ninth Circuit disagreed with the Tax Court's analysis reflects the difficulty in finding a benefit to Gary Weiner from his charitable donation, and demonstrates that even if Gary Weiner's interpretation was incorrect, it was certainly reasonable. Gary Weiner consulted with his accountant and an attorney, who advised him that he would be entitled to deduct his contributions. In addition, the charity concluded that there were no goods or services provided to Gary Weiner "for that payment." In this situation, the taxpayer did not know, or have reason to know, that the receipt was "unreasonable." Thus, Gary Weiner was entitled to rely upon the receipts from the charity in 1997 and 1998.

The Ninth Circuit's Opinion has the effect of applying the draconian rule of IRC § 170(f)(8) when the charity merely makes *a valuation error*. In this case, the charity's receipt met the three statutory requirements of IRC § 170(f)(8)(B). First, the receipt states the amount of cash contributed. Second, the receipt states "[w]hether the donee organization provided any goods or services in consideration . . . for [the contribution]"—here, the receipt stated that none was provided. Third, the receipt provides a "description and good faith estimate of the value of any goods . . . referred to [under the second requirement.]" Here, the charity evaluated the facts in good faith and concluded that Gary Weiner received nothing back in return for the contribution. The Ninth Circuit

Opinion basically concludes that because the charity made a valuation error, the entire deduction is lost. This problem could arise whenever a charity makes a valuation error in concluding that no goods or services were provided in return for a contribution.

CONCLUSION

For the reasons set forth above, this Court should grant this petition for certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed JUL. 8, 2004]

No. 02-73609
IRS No. 7731-00

GARY L. WEINER,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from a Decision of the United States Tax Court
Argued and Submitted March 25, 2004
San Francisco, California

MEMORANDUM *

Before: CANBY, NOONAN, and THOMAS, *Circuit Judges*.

For the reasons stated in *Addis v. Commissioner*, No. 02-73628 (9th Cir. July 8, 2004), the tax court's judgment is AFFIRMED.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed JUL. 8, 2004]

No. 02-73628
IRS No. 6628-00

CHARLES H. ADDIS; CINDI ADDIS,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from a Decision of the United States Tax Court
Argued and Submitted March 25, 2004—
San Francisco, California

OPINION

Before: WILLIAM C. CANBY, JR., JOHN T. NOONAN, and SIDNEY R. THOMAS, *Circuit Judges*.

NOONAN, *Circuit Judge*:

Charles H. Addis and his wife Cindi Addis appeal a Tax Court judgment denying them charitable contribution deductions for their payments to the National Heritage Foundation ("NHF") in 1997 and 1998. The central question is whether 26 U.S.C. § 170(0(8) disallows the deductions because the receipts substantiating the transfers to the NHF stated the Addises received no consideration though they expected the NHF to use their funds to pay part of the premiums on life

insurance benefitting their trust pursuant to a split-dollar arrangement. We hold that section 170(0(8) bars the deductions and affirm the decision of the Tax Court.

FACTS

Charles Addis is a farm labor contractor and his wife Cindi Addis is a bookkeeper. They are the initial trustees and beneficiaries of the Charles H. Addis Family Trust, which they created on May 7, 1986. On the couple's deaths, the trust benefits their family members.

The NHF is a tax-exempt organization under 26 U.S.C. § 501(c)(3) and is eligible to receive tax-deductible contributions under 26 U.S.C. § 170 if tax code requirements are satisfied.

The questions we consider arise from the Addises' attempts to claim charitable contribution deductions for payments to the NHF in connection with a "charitable split-dollar" arrangement. "In general, a charitable split-dollar insurance transaction involves a transfer of funds by a taxpayer to a charity, with the understanding that the charity will use the transferred funds to pay premiums on a cash value life insurance policy that benefits both the charity and the taxpayer's family." I.R.S. Notice 99-36, 1991-1 C.B. 1284.

The split-dollar agreement

On October 10, 1997, Charles Addis wrote NHF president Dr. J. T. Houk stating the Addis trust was going to obtain life insurance on Cindi Addis and offering the NHF the option of buying an interest in the policy. Addis wrote: "The premium for National Heritage Foundation's interest under the option is $36,000.00 a year for 12 years."

On October 15, 1997, the NHF and the Addis trust entered an agreement governing the NHF's option of buying policy benefits from the Addis trust. The same day, Commercial Union Life Insurance Company issued a policy on Cindi

Addis, then 44, to Charles Addis in his capacity as trustee. The initial death benefit was $991,789.00. The annual policy premium was $40,000.

Under the split-dollar agreement, the NHF had the option of paying $36,000—90% of the annual premium—for a "planned premium period" of twelve years. The NHF would then be entitled to $557,280—about 56% of the initial death benefit—if Cindi Addis died. The NHF's share of the death benefit was fixed even if the death benefit increased in value, as projected.

If the policy was surrendered and the NHF had made all its premium payments, the NHF would be entitled to its "termination account value"—the aggregate of all the premiums it had paid over the years minus the "cost" of its share of the death benefit measured using a factor set by the agreement called the "annual renewable term (ART)" rate.

Though the agreement contemplated payments by the NHF for twelve years, the NHF could opt to not pay all or any part of its premium portion. Depending on the shortfall and amount of prior payments, the NHF's benefits might be curtailed. Because the NHF used the Addises' $36,000 transfers to pay policy premiums in each of the tax years at issue, we discuss only the provisions that govern if the NHF paid its full portion.

Under the split-dollar agreement, the Addis trust would pay only 10% of the annual premium but be entitled to about 44% of the initial death benefit plus the projected increases in the death benefit over the years. The Addises retained the sole right to borrow on the policy or surrender the policy. If the Addises chose to surrender the policy, the Addis trust owned the net cash surrender value less the NHF's termination account value.

If the policy death benefit fell below the amount sufficient to give the NHF its share of the death benefit, the Addis trust

would pay the shortfall. Similarly, if the policy's net surrender value proved insufficient to provide the NHF with the amount to which it was entitled on surrender, the Addis trust would pay the shortfall.

Insurance marketer Lawrence D. Cronin testified: "The Addis case was actually the first case that we ever sold" involving the split-dollar concept. NHF President Houk testified that about 600 to 700 of the 4,500 foundations under the NHF aegis were based on similar split-dollar arrangements.

The money transfers by the Addises, premium payments by the NHF, and charitable contribution deduction claims

The same day that Charles Addis wrote to Houk proposing the split-dollar arrangement, the Addises paid $285 to the NHF to establish a charitable foundation under the NHF umbrella. The NHF sent the Addises a plaque and operations manual, as was the organization's practice with new foundations.

About a month after the NHF and the Addis trust entered the split-dollar agreement, the Addises sent a $36,000 check dated November 13, 1997 to the NHF. Charles Addis's cover letter stated in part:

> I am expecting you will use my donation to pay the premiums on the policy payable to my foundation. Although I realize you are under no obligation to do so, I request that you use my donation for that purpose.

In another check, also dated November 13, 1997, the Addises paid Commercial Union Life their premium portion of $4,000.

Charles Addis acknowledged in testimony before the Tax Court that the Addises expected the NHF to use their money to pay premiums pursuant to the split-dollar option agreement. Charles Addis explained that "they said they were going to make the payments." Charles Addis testified that if

the NHF did not make the premium payments, "we would, obviously, contact them and say, why not, and if we weren't satisfied, we'd quit giving them money."

On November 19, 1997, the NHF credited the Addis Family Foundation with the Addises' $36,000 transfer, then debited the Addis account the same day to reflect that the $36,000 was sent to Commercial Union Life Insurance Company. The NHF's receipt substantiating the Addises' payment stated: "In accordance with IRS regulations, the National Heritage Foundation did not provide any goods or services to the donor in return for the contribution."

The Addises claimed a $36,285 charitable contribution deduction on their 1997 tax return for their transfer of funds to the NHF.

In October 1998, the Addises again made a $36,000 payment to the NHF and sent $4,000 to Commercial Union. The NHF again credited the Addis Family Foundation with $36,000 and debited the Addis account on the same day to reflect that the Addises' money was forwarded to Commercial Union. The NHF receipt substantiating the Addises' payment stated: "NHF did not provide any goods or services to the donor in return for the contribution."

The Addises claimed a $36,000 charitable contribution deduction on their 1998 tax return for their transfer of funds to the NHF.

The NHF ceased engaging in split-dollar arrangements after Congress in 1999 enacted 26 U.S.C. § 170(f)(10), which disallows deductions when an organization uses transferred funds to pay premiums on life insurance "with respect to the transferor" and levies a 100% excise tax on the premium payments. *See* Ticket to Work and Work Incentives Improvement Act of 1999, § 537, Pub. L. 106-170, § 537, 113 Stat. 1860, 1936. The Senate report regarding section 170(0(10) characterized charitable split-dollar arrangements as "an abuse of the charitable contribution deduction" where, "[i]n substance,

the charity receives a transfer of a partial interest in an insurance policy, for which no charitable contribution deduction is allowed." S. Rep. No. 106-201, at 42 (1999). The denial of a deduction in section 170(0(10) was intended to be a clarification and restatement of preexisting law: "While there is no basis under present law for allowing a charitable contribution deduction in these circumstances," section 170(0(10) was enacted to "stop the marketing of these transactions immediately." *Id.*

PROCEEDINGS BELOW

On March 20, 2000, the Addises received a notice of deficiency in their 1997 and 1998 federal income taxes due to the disallowance of the charitable contribution deductions they claimed for their transfers to the NHF. The notice stated that the Addises owed $13,062 for the 1997 tax year and $12,960 for the 1998 tax year.

The Addises petitioned the Tax Court for a redetermination. The Tax Court ruled that the deductions were disallowed by 26 U.S.C. § 170(0(8) because the Addises' contemporaneous substantiation of their payments to the NHF inaccurately stated they received no consideration in exchange and did not reveal that they expected the NHF to use their funds to pay premiums on life insurance owned by their trust. *Addis v. Comm'r*, 118 T.C. 528, 536-37 (2002). The Tax Court found that

> Petitioners and NHF designed a scheme purporting to provide no benefits to petitioners in exchange (or consideration) for petitioners' payments. However, petitioners received substantial benefits from NHF under the life insurance policy. . . . [P]etitioners expected, and they told NHF that they expected, NHF to use their contributions for both their and NHF's benefit.

Id. at 536. The Tax Court did not reach the question of whether the deductions were also disallowed under 26 U.S.C.

§ 170(0(3) because in substance the Addises had contributed a partial interest to the NHF.

The Addises appeal.

ANALYSIS

The consideration disclosure requirement

"[O]ur tax structure is based on a system of self reporting." *United States v. Bisceglia*, 420 U.S. 141, 145 (1975). "There is legal compulsion, to be sure, but basically the Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability." *Id.*

The tax code provision we apply, 26 U.S.C. § 170(f)(8), aids in effective administration of the self-reporting and self-assessment system. Section 170(0(8) provides in relevant part:

> (A) General rule.—No deduction shall be allowed under subsection (a) for any contribution of $250 or more unless the taxpayer substantiates the contribution by a contemporaneous written acknowledgment of the contribution by the donee organization that meets the requirements of subparagraph (B).
>
> (B) Content of acknowledgment.—An acknowledgement meets the requirements of this subparagraph if it includes the following information:
>
> (i) The amount of cash and a description (but not value) of any property other than cash contributed.
>
> (ii) Whether the donee organization provided any goods or services in consideration, in whole or in part, for any property described in clause (i)
>
> (iii) A description and good faith estimate of the value of any goods or services referred to in clause (ii) or, if

> such goods or services consist solely of intangible religious benefits, a statement to that effect.

26 U.S.C. § 170(0(8). Congress enacted section 170(0(8) to increase compliance with the rule that "where a charity receives a quid pro quo contribution (i.e, a payment made partly as a contribution and partly in consideration for goods or services furnished to the payor by the donee organization)," a charitable contribution deduction is limited to the amount exceeding the value of the consideration received. H. Rep. 103-111, at 785 (1993). Section 170(0(8) "does not impose an information reporting requirement upon charities; rather it places the responsibility upon taxpayers . . . to request . . . substantiation from the charity of their contribution (and any good or service received in exchange)." H. Conf. Rep. 103-213, at 563-64 (1993).

The consideration disclosure requirement in section 170(f)(8) is threefold: the receipt must (1) state whether any goods and services were given as consideration; (2) describe the consideration provided, if any; and (3) give a good-faith estimate of the value of the consideration, if any, unless it consists solely of intangible religious benefits.

Goods and services that must be disclosed include "cash, property, services, benefits, and privileges . . . provided in a year other than the year in which the taxpayer makes the payment to the donee organization." 26 C.F.R. § 1.170A-13(0(5),(6). "A donee organization provides goods or services in consideration for a taxpayer's payment if, at the time the taxpayer makes the payment to the donee organization, the taxpayer receives or expects to receive goods or services in exchange for that payment." 26 C.F.R. § 1.170A-13(f)(6).

The undisclosed benefit the Addises expected

The main dispute on appeal is whether the Addises received or expected to receive consideration for their payments to the NHF. The Tax Court ruled that the Addises'

receipts incorrectly stated they received no consideration because they expected the NHF to make premium payments on a policy that would provide "substantial benefits" to their trust. *Addis v. Comm'r*, 118 T.C. 528, 536 (2002). We agree the receipts did not disclose the consideration the Addises expected. We clarify what constituted the undisclosed benefit.

The Addises' $36,000 payments were inducements for the NHF to take the split-dollar deal in the option agreement. The split-dollar insurance arrangement, which conferred benefits on the Addises disproportionate to their 10% premium payments, was the consideration the receipts failed to disclose.

The life insurance policy, with its benefits carved by the split-dollar agreement, was an investment instrument that the designer of the Addises' split-dollar plan, Lawrence D. Cronin, likened to a bond. But the split of investment returns compared to investment outlays was remarkably uneven. For twelve years, the NHF would put up 90% of the investment corpus but be entitled to none of the gains from the projected positive investment performance exceeding the NHF's guaranteed $557,280 in death benefits if Cindi Addis should die. If the Addises exercised their unilateral power to surrender the policy, the NHF would get back just the amounts it paid in, less the cost of its share of the death benefit—and with no compensation for lost interest and other investment value.

The Addises put up only 10% of the investment corpus but were entitled to all the projected gains in cash value and death benefit amount less the NHF's fixed $557,280 share of the death benefit or the return—without interest—of the NHF's premium outlays exceeding the cost of the NHF's share of the death benefit.

As with any investment, the life insurance policy would take time to build in value. The Addises expected time. Cindi Addis was just 44 and healthy at the start of the split-dollar

deal. The Addises contemplated payments by the NHF for twelve years. From the start, Charles Addis wrote Houk: "The premium for National Heritage Foundation' interest under the option is $36,000.00 a year for 12 years."

After twelve years, according to Commercial Union projections, the death benefit would amount to more than $1.5 mil-lion. Despite paying 90% of the policy premiums each year, the NHF would only be entitled to its fixed $557,280—about 36% of the projected death benefit. The split-dollar agreement gave the Addises ownership of the remaining projected gain of close to a million—nearly twice the NHF's fixed share of the death benefit even though the NHF paid nine times more of the annual policy premium. After twelve years, the Addises would also own and be able to borrow on a disproportionate share of the projected cash value of the policy.

Why would the NHF take the uneven deal? The Addises' transfers of $36,000 constituted the inducement. The importance of the Addises' payments is highlighted by the fact that the NHF stopped participating in split-dollar deals after Congress imposed a 100% excise tax on a charity that, "in connection" with a transfer of funds, pays, has paid or is expected to pay "any premium" directly or indirectly on life insurance "with respect to the transferor." *See* 26 U.S.C. § 170(0(10). NHF Director Houk explained that section 170(0(10) "made our investment possibilities in these [split-dollar] programs unfavorable for us."

The Addises argue the proper inquiry is whether the policy benefits to which they were entitled in 1997 and 1998 were paid for entirely by their $4,000 partial premium payments. The regulatory definition of consideration, however, calls for us to view all the benefits the Addises expected from the split-dollar deal. The regulatory definition of goods and services to embrace expected future consideration means that anticipated consideration must be disclosed even if not

currently taxable as income. Each $36,000 payment by the Addises was "in exchange for" the NHF's participation in the split-dollar deal and continuation of the life of the arrangement.

We conclude the Addises expected consideration for their payments to the NHF. The Addises' receipt did not meet any of the three disclosure requirements of section 170(0(8).

The Addises' unavailing invocation of exceptions to the consideration disclosure duty

The substantial consideration the Addises expected did not qualify for the exemption from the disclosure requirement for goods and services of "insubstantial value." *See* 26 C.F.R. § 1.170A-13(0(8). For the exemption to apply, the Addises' payments must have been made "in the context of a fund-raising campaign in which the charity informs patrons how much of their payment is a deductible contribution" and "[t]he fair market value of all of the benefits received in connection with the payment" could not have exceeded $69 for the 1997 tax year and $71 for the 1998 tax year. *See* 26 C.F.R. § 1.170A-13(0(8)(A); Rev. Proc. 90-12, 1990-1 C.B. 471, *supplemented by* Rev. Proc. 96-59, 1996-2 C.B. 392; Rev. Proc. 97-57, 1997-2 C.B. 584.

The Addises argue that 26 C.F.R. § 1.170A-1(h)(4) permits them to rely on the NHF's receipt and conclude that any goods or services were insubstantial and need not be disclosed. The Addises cannot avail themselves of the protection of section 1.170A-1(h)(4). The regulation provides that "a taxpayer may rely on . . . a contemporaneous written acknowledgment provided under section 170(0(8) . . . for the fair market value of any goods or services," unless "the taxpayer knows, or has reason to know, that such treatment is unreasonable." 26 C.F.R. § 1.170A-l(h)(4). The Addises were privy to all the details of the split-dollar arrangement. Indeed, Charles Addis wrote to the NHF to propose the benefits split.

The Addises had reason to know that the consideration they expected was substantial.

The consequences: total denial of a deduction

Section 170(f)(8) provides that when its substantiation provisions are not satisfied "[n]o deduction shall be allowed" for payments over $250. The plain language of the provision forbids a deduction to the Addises. Having failed to satisfy a provision intended to ensure compliance with the rule of partial charitable contribution deductions for quid pro quo payments, the Addises nonetheless seek to avail themselves of the quid pro quo rule and argue in the alternative for a partial deduction. A partial deduction is foreclosed by the statutory language. The deterrence value of section 170(f)(8)'s total denial of a deduction comports with the effective administration of a self-assessment and self-reporting system.

As the Tax Court's denial of deductions based on 26 U.S.C. § 170(0(8) was proper, we have no occasion to reach the Commissioner's alternative contention that 26 U.S.C. § 170(0(3) also bars the deductions because, in substance, the Addises gave the NHF a gift of a partial interest in property.

AFFIRMED.

APPENDIX C

UNITED STATES TAX COURT
T.C. Memo. 2002-153
[Filed June 18, 2002]

Docket No. 7731-00

GARY L. WEINER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Steven R. Toscher, for petitioner.

David Holtz, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

COLVIN, *Judge*: Respondent determined deficiencies in petitioner's Federal income tax of $37,012 for 1997 and $33,373 for 1998.

Petitioner claimed charitable contribution deductions for his payment to the National Heritage Foundation (NHF) of $93,000 in 1997 and $93,000 in 1998, which NHF used to pay premiums on life insurance policies for the lives of petitioner's daughter and son-in-law. The insurance policies were so-called charitable split-dollar life insurance contracts, under which NHF was entitled to receive from 48 percent to 92 percent of the initial death benefits, and petitioner's family trusts were entitled to receive from 8 percent to 52 percent of those benefits. Respondent determined that petitioner is not entitled to charitable contribution deductions for his payments to NHF.

The sole issue for decision is whether petitioner may deduct his payments to NHF as charitable contributions.[1] We hold that he may not.

Unless otherwise indicated, section references are to the Internal Revenue Code.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found.

A. *Petitioner*

Petitioner, a dentist, resided in Los Angeles, California, when he filed the petition. Traci Rae Pontello and Wendi Lyn Iannaccone are petitioner's adult daughters, and Frank James Pontello is petitioner's son-in-law.

B. *Petitioner's Family Trusts and Foundation*

1. *The Traci Rae Pontello Irrevocable Trust and the Frank James Pontello Irrevocable Trust*

On September 21, 1995, petitioner created the Traci Rae Pontello Irrevocable Trust (TRP trust) and the Frank James Pontello Irrevocable Trust (FJP trust). Wendi Lyn Iannaccone was trustee for the TRP trust, and Traci Rae Pontello was trustee for the FJP trust. Petitioner was the sole beneficiary of the TRP and FJP trusts (the family trusts). Under the trust instruments, petitioner's daughters become beneficiaries of the family trusts upon the death of petitioner.

2. *NHF*

NHF is a section 501(c)(3) organization and is eligible to receive tax-deductible contributions under section 170(c)(2).

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[1] Petitioner contends that sec. 7491(a) requires respondent to bear the burden of proof on all issues in the case. We need not decide petitioner's contention because our findings and analysis do not depend on which party bears the burden of proof.

3. *The Gary Weiner Family Foundation*

On October 1, 1995, petitioner established a fund within NHF called the Gary Weiner family foundation. The purpose of the Gary Weiner family foundation is to fund medical research and other educational programs. Petitioner paid $265 to NHF to establish his foundation.

C. *The Charitable Split-Dollar Insurance Agreements*

On October 15, 1995, the family trusts and NHF entered into split-dollar insurance agreements (SDIAs) to divide the death benefits from the life insurance policies on the lives of Traci Rae Pontello and Frank Pontello that would be issued to the family trusts. The SDIAs remained in effect through 1998.

In the SDIAs, the family trusts and NHF agreed that, if NHF paid about $93,000 of the annual premiums, NHF and the family trusts would become entitled to the following initial death benefits:

Policy	Initial death benefit	NHF's Portion of Initial death Benefit	Trusts' portion of initial death benefit	Trusts' percentage of initial death benefit
Western Reserve Life Assurance policy no. 01B0349122 (WRL 01B0349122)	$1,500,000	$750,000	$750,000	50
Western Reserve Life Assurance policy no. 01-B0349121 (WRL 01-B0349121)	1,700,000	820,000	880,000	52
Bankers United Life Assurance policy no. B140145 (BUL B140145)	819,672	750,000	69,672	8
Bankers United Life Assurance policy no. B140146 (BUL B140146)	1,307,531	820,000	487,531	37

The family trusts agreed to pay any premiums due on those insurance policies. The amounts of the death benefits payable toNHF remain fixed at the various initial death benefit amounts even if the death benefits increased under the various policies.

Under the SDIAs, as long as the annual premiums were paid, the family trusts were entitled to receive death benefits in the amounts stated in the policies plus any increase in death benefits under the policies.

D. *The Insurance Policies on Petitioner's Daughter and Son-In-Law*

On October 17 and 18, 1995, the TRP trust bought BUL B140146 and WRL 0180349121 on the life of Traci Rae Pontello. On October 17 and 18, 1995, the FJP trust bought BUL B140145 and WRL 01B0349122 on the life of Frank Pontello.

E. *Petitioner's Payments to NHF and to the Insurance Companies*

Petitioner sent checks for $93,000 to NHF on November 30, 1995, October 24, 1996, October 23, 1997, and October 21, 1998. NHF was not obligated to use petitioner's funds to pay the premiums on the insurance policies on the lives of his daughter and son-in-law, but petitioner expected NHF to do so. On the day that NHF received petitioner's payments, NHF paid to the insurance companies its $92,722 portion of the premiums for the life insurance policies on the lives of Traci Rae Pontello and Frank Pontello. Each year from 1995-98, the trusts paid $7,278 to the insurance companies for premiums on those insurance policies.

NHF gave petitioner a receipt for each of his $93,000 payments in which NHF stated that "NHF did not provide any goods or services to the donor in return for the contribution."

F. *Petitioner's Tax Returns and the Notice of Deficiency*

Petitioner claimed deductions for charitable contributions to NHF of $93,000 in 1997 and $93,000 in 1998. Respondent determined in the notice of deficiency that petitioner is not entitled to those deductions.

OPINION

Petitioner contends that he may deduct $93,000 in 1997 and 1998 as charitable contributions to NHF. We disagree.

We recently decided *Addis v. Commissioner*, 118 T.C. ____ (2002), in which the taxpayers deducted their payments to NHF under a split-dollar life insurance plan. The split-dollar life insurance plan in *Addis* is indistinguishable from the plan that petitioner used. In *Addis*, NHF used the funds from the taxpayers to pay for life insurance on the life of Mrs. Addis and, as a result, the taxpayers' family trust became entitled to receive part of the death benefits from the life insurance policy. In *Addis*, NHF gave the taxpayers receipts in which NHF stated that the taxpayers received no consideration in exchange for their payments. We held that the taxpayers could not deduct the payments as charitable contributions because NHF did not state in the receipts for those payments that it used the taxpayers' funds to pay for a life insurance policy under which the taxpayers would receive part of the death benefits. We held that the taxpayers did not comply with the substantiation requirement of section 170(f)(8)[2] and section 1.170A-13(f) (6), Income Tax

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[2] Sec. 170(f)(8) provides in part:

> (A)General rule.—No deduction shall be allowed under subsection (a) for any contribution of $250 or more unless the taxpayer substantiates the contribution by a contemporaneous written acknowledgment of the contribution by the donee organization that meets the requirements of subparagraph (B).

Regs.,[3] because NHF incorrectly stated in the receipts that the taxpayers received no consideration for their payments. We reach the same conclusion here because the facts of this case and of *Addis* are indistinguishable.

As in *Addis*, NHF gave petitioner receipts for his payments which stated that NHF had not provided any goods or services to petitioner in return for those payments. Petitioner expected NHF to use his payments of $93,000 to pay NHF's portion of the premiums on the life insurance policies in 1997 and 1998 and thus expected his family trusts to receive a substantial part of the death benefits under the policies. NHF failed to make a good faith estimate of the value of those benefits as required by section 170(f) (8) (B) (iii).

Petitioner's contention that his expectation that NHF would pay the premiums on the life insurance policies was not consideration under section 170(f)(8) fails to take into account the definition of consideration in section 1.170A-13(f)(6), Income Tax Regs. A donee organization provides goods or services in consideration for a taxpayer's payment

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(B)Content of acknowledgment.—An acknowledgment meets the requirements of this subparagraph if it includes the following information:

(i)The amount of cash and a description (but not value) of any property other than cash contributed.

(ii)Whether the donee organization provided any goods or services in consideration, in whole or in part, for any property described in clause (i).

(iii)A description and good faith estimate of the value of any goods or services referred to in clause (ii) * * *.

[3] Sec. 1.170A-13(f)(6), Income Tax Regs., provides:

(6) In consideration for.—A donee organization provides goods or services in consideration for a taxpayer's payment if, at the time the taxpayer makes the payment to the donee organization, the taxpayer receives or expects to receive goods or services in exchange for that payment. * * *

if, at the time the taxpayer makes the payment to the donee organization, the taxpayer receives or expects to receive goods or services in exchange for that payment. *Id.*

Petitioner's daughters, rather than petitioner, were the trustees of the family trusts. In contrast, in *Addis*, the taxpayers were the trustees. Like the taxpayers in *Addis*, petitioner expected that he would benefit from his payments to NHF. Just as in *Addis*, NHF used petitioner's money to pay the premiums on the life insurance policies under which petitioner or his daughters, through the family trusts, were entitled to receive a substantial part of the death benefits.

As in *Addis*, petitioner's failure to comply with section 170(f)(8) results in disallowance of his charitable contribution deductions. Thus, petitioner may not deduct his contributions to NHF of $93,000 in 1997 and $93,000 in 1998.

To reflect the foregoing,

Decision will be entered for respondent.

APPENDIX D

UNITED STATES TAX COURT
WASHINGTON. DC 20217

Docket No. 7731-00

GARY L. WEINER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Court's Memorandum Findings Of Fact And Opinion, T.C. Memo. 2002-153, filed June 18, 2002, it is

ORDERED AND DECIDED that there are deficiencies in income tax due from the petitioner for the taxable years 1997 and 1998 in the amounts of $37,012 and $33,373, respectively.

/s/ John O. Colvin
JOHN O. COLVIN
Judge

ENTERED: AUG. 6, 2002

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed SEP. 21, 2004]

No. 02-73609
IRS No. 7731-00
Central District of California, Los Angeles

GARY L. WEINER,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

ORDER

Before: CANBY, NOONAN, and THOMAS, *Circuit Judges.*

The panel has voted unanimously to deny the petition for rehearing. Judge Thomas has voted to deny petition for rehearing en banc and Judges Canby and Noonan recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

APPENDIX F

26 U.S.C. § 170(f)(8). Charitable, etc., contributions and gifts.

* * * *

(f) Denial of deduction in case of certain contributions of partial interests in property.

* * * *

(8) Substantiation requirement for certain contributions.

(A) General rule. No deduction shall be allowed under subsection (a) for any contribution of $250 or more unless the taxpayer substantiates the contribution by a contemporaneous written acknowledgment of the contribution by the donee organization that meets the requirements of subparagraph (B).

(B) Content of acknowledgment. An acknowledgment meets the requirements of this subparagraph if it includes the following information:

(i) The amount of cash and a description (but not value) of any property other than cash contributed.

(ii) Whether the donee organization provided any goods or services in consideration, in whole or in part, for any property described in clause (i).

(iii) A description and good faith estimate of the value of any goods or services referred to in clause (ii) or, if such goods or services consist solely of intangible religious benefits, a statement to that effect.

For purposes of this subparagraph, the term "intangible religious benefit" means any intangible religious benefit which is provided by an organization organized exclusively for religious purposes and which generally is not sold in a commercial transaction outside the donative context.

(C) Contemporaneous. For purposes of subparagraph (A), an acknowledgment shall be considered to be contemporaneous if the taxpayer obtains the acknowledgment on or before the earlier of—

(i) the date on which the taxpayer files a return for the taxable year in which the contribution was made, or

(ii) the due date (including extensions) for filing such return.

(D) Substantiation not required for contributions reported by the donee organization. Subparagraph (A) shall not apply to a contribution if the donee organization files a return, on such form and in accordance with such regulations as the Secretary may prescribe, which includes the information described in subparagraph (B) with respect to the contribution.

(E) Regulations. The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this paragraph, including regulations that may provide that some or all of the requirements of this paragraph do not apply in appropriate cases.

26 C.F.R. § 1.170A-1(h)(4). Charitable, etc. contributions and gifts; allowance of deduction.

* * * *

(h) Payment in exchange for consideration.

* * * *

(4) Donee estimates of the value of goods or services may be treated as fair market value.

(i) In general. For purposes of section 170(a), a taxpayer may rely on either a contemporaneous written

acknowledgment provided under section 170(f)(8) and §1.170A-13(f) or a written disclosure statement provided under section 6115 for the fair market value of any goods or services provided to the taxpayer by the donee organization.

(ii) Exception. A taxpayer may not treat an estimate of the value of goods or services as their fair market value if the taxpayer knows, or has reason to know, that such treatment is unreasonable. For example, if a taxpayer knows, or has reason to know, that there is an error in an estimate provided by an organization described in section 170(c) pertaining to goods or services that have a readily ascertainable value, it is unreasonable for the taxpayer to treat the estimate as the fair market value of the goods or services. Similarly, if a taxpayer is a dealer in the type of goods or services provided in consideration for the taxpayer's payment and knows, or has reason to know, that the estimate is in error, it is unreasonable for the taxpayer to treat the estimate as the fair market value of the goods or services.

26 C.F.R. §1.170A-13(f)(6). Recordkeeping and return requirements for deductions for charitable contributions.

* * * *

(f) Substantiation of charitable contributions of $250 or more.

* * * *

(6) In consideration for. A donee organization provides goods or services in consideration for a taxpayer's payment if, at the time the taxpayer makes the payment to the donee organization, the taxpayer receives or expects to receive goods or services in exchange for that payment. Goods or services a donee organization pro-

vides in consideration for a payment by a taxpayer includes goods or services provided in a year other than the year in which the taxpayer makes the payment to the donee organization.